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IN THE

Supreme Court of the United States

October Term, 1953

Docket No. 724

JAMES J. BRESLIN,

Petitioner,

—against—

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS, STATE OF NEW YORK

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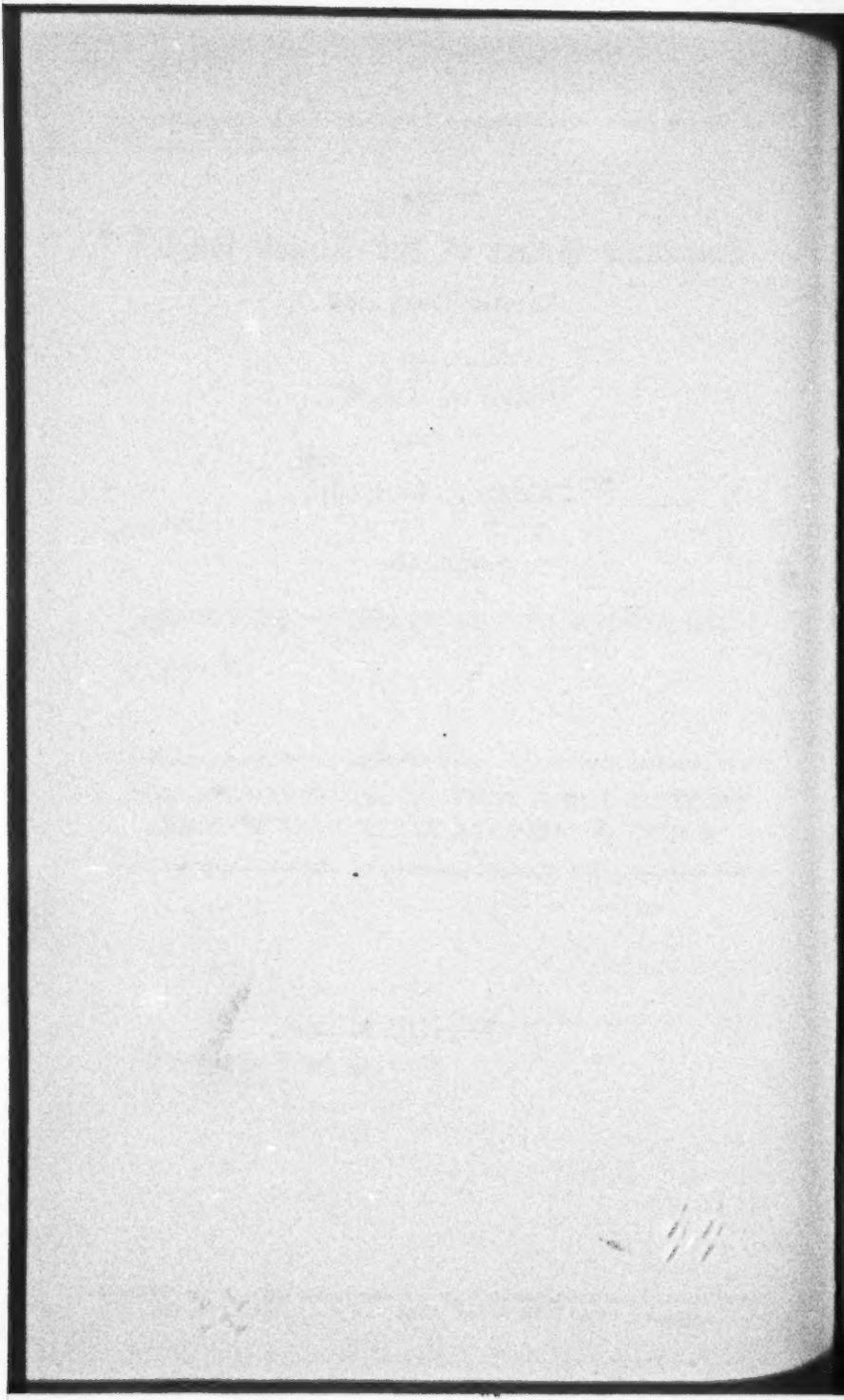

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To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

James J. Breslin prays that a writ of certiorari issue to review the judgment of the Court of Appeals, State of New York, rendered and entered on March 12, 1954, denying a motion for reargument of an appeal to that Court and granting a motion to amend the remittitur in the above cause so as to indicate that a federal question was therein presented and passed upon. A judgment of the County Court, County of Kings, State of New York, rendered on March 10, 1953, convicted the petitioner of the crime of Criminal Contempt of Court (New York Judiciary Law, §750 subdiv. A, 5; New York Code of Criminal Procedure §619; New York Penal Law §600, subdiv. 6), after a trial

by Joyce, County Judge, and a special jury. Petitioner was sentenced to one year in the New York City Penitentiary. The Appellate Division of the Supreme Court of the State of New York affirmed the conviction without opinion, but with a brief memorandum reported in 282 App. Div. 747, Appendix, *post*, p. i (R. 11, 146, 156, ff. 33, 438 467). Leave to appeal and admission of petitioner to bail after he had served part of the sentence was granted by Associate Judge Froessel of the Court of Appeals, State of New York (R. 159, ff. 475-77). After more than two months of deliberation, the judgment of the Appellate Division was affirmed on February 25, 1954 with a *per curiam* opinion by the Court of Appeals reported in 306 N. Y. 294, 118 N. E. 2d 108, Appendix, *post*, p. ii. Stay of execution pending disposition of this petition for certiorari was granted by Associate Judge Fuld of the Court of Appeals. The indictment of petitioner (R. 6-9, ff. 16-27) resulted from his refusal to answer a question before the grand jury after having been ordered to do so by Leibowitz, County Judge, County of Kings, State of New York. Upon Judge Leibowitz's direction, the indictment was returned, and because of the learned judge's inflammatory remarks on the occasion of argument of a motion to dismiss this indictment, Judge Leibowitz was disqualified as trial judge by order of the Supreme Court, State of New York, County of Kings, in an opinion by Justice Norton, reported in 128 New York Law Journal at p. 1147, col. 1 (November 13, 1952), Appendix, *post*, p. iii. A motion for reargument of this order disqualifying Judge Leibowitz was denied by the Supreme Court, State of New York, County of Kings, in memorandum by Justice Norton, reported in 128 New York Law Journal at p. 1331, col. 7 (December 1, 1952), Appen-

dix, *post*, p. iv. The Appellate Division, Supreme Court, State of New York, unanimously denied review of the order of Justice Norton, in memorandum reported in 281 App. Div. 830, Appendix, *post*, p. iv.

Jurisdiction

The jurisdiction of this court is invoked under 28 U. S. C. §1257(3). See also Rules 12, 38, Revised Rules of the Supreme Court of the United States, adopted February 13, 1939, as amended. The judgment of the Court of Appeals, State of New York, was entered March 12, 1954. Grounds for invokement of jurisdiction are that the questions presented by petitioner constitute grave ones of constitutional law involving the rights of petitioner under the due process and privileges and immunities clauses of the Fourteenth Amendment of the Constitution of the United States, insofar as such provisions guarantee in a state criminal proceeding petitioner's right to a fair trial, his rights of privacy, freedom of expression and liberty of silence; his privilege against self-incrimination; and his right against actual execution by respondent of its threat of a year's imprisonment unless petitioner confess to a series of felonies. Each point involves, in one or more of its aspects, a matter of first impression in this Court.

Opinions Below

An opinion, rendered by Mr. Justice Norton of the Supreme Court, State of New York, County of Kings, Special Term, on November 12, 1952, disqualifying County Judge Leibowitz for prejudice in this case, was reported in 128 New York Law Journal at p. 1147, col. 1 (November 13,

1952), Appendix, *post*, p. iii. A motion for reargument of this order disqualifying Judge Leibowitz was denied by the Supreme Court, State of New York, County of Kings, in memorandum by Justice Norton, reported in 128 New York Law Journal at p. 1331, col. 7 (December 1, 1952), Appendix, *post*, p. iv. The Appellate Division, Supreme Court, State of New York, unanimously denied review of the order of Justice Norton, in memorandum reported in 281 App. Div. 830, Appendix, *post*, p. iv. No opinion was rendered by the trial court in connection with the judgment of conviction. The affirmance by the Appellate Division, Supreme Court was without opinion but with a brief memorandum reported in 282 App. Div. 747, Appendix, *post*, p. i. The affirmance by the Court of Appeals was with a *per curiam* opinion reported in 306 N. Y. 294, 118 N. E. 2d 108, Appendix, *post*, p. ii.

Questions Presented

The following questions under the Fourteenth Amendment of the Constitution of the United States, having been passed upon by the Court of Appeals of the State of New York adversely to petitioner, are presented:

1. Does the acknowledged prejudice of the presiding judge under whose direction an indictment against petitioner was returned coupled with the "directed verdict" of guilty by a trial judge deny the petitioner due process of law in a procedural sense under the Fourteenth Amendment?

2. Does the actual execution by a State of its threat of a year's imprisonment unless an involuntary "witness", against whom a grand jury investigation is in fact being directed, confesses to the

commission of a series of felonies, violate the due process clause of the Fourteenth Amendment?

3. Does the flat denial by a State of both immunity for incriminating answers and the right to refuse to answer incriminating questions, under the circumstances of this case, constitute a denial of due process of law or an abridgment of the privileges and immunities of citizens of the United States, under the Fourteenth Amendment?

4. Does actual punishment at the hands of a State for failure to confess to a series of felonies, constitute an invasion of privacy and denial of both liberty of silence and freedom of expression guaranteed by the due process clause of the Fourteenth Amendment?

Constitutional and Statutory Provisions Involved

Constitution of the United States of America Article XIV, §1:

"* * *. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; * * *".

Constitution of the State of New York, Article 1, §6:

"* * * nor shall he be compelled in any criminal case to be a witness against himself, providing, that any public officer who, upon being called before a grand jury to testify concerning the conduct of his office or the performance of his official duties, refuses to sign a waiver of immunity against subsequent criminal prosecution, or to answer any relevant question concerning such matters before such grand jury,

shall by virtue of such refusal, be disqualified from holding any other public office or public employment for a period of five years, and shall be removed from office by the appropriate authority or shall forfeit his office at the suit of the attorney-general."

Code of Criminal Procedure, §10:

"No person to be a witness against himself in a criminal action or to be unnecessarily restrained

"No person can be compelled in a criminal action to be a witness against himself, * * *."

Penal Law, §381:

"Offender a competent witness; witnesses' privileges

"A person who has violated any section of this chapter relating to bribery or any section of this article or who has committed an attempt to violate any such section is a competent witness against another person so offending. No person shall be excused from attending and testifying, or producing any books, papers or other documents before any court, magistrate or referee, or before any joint legislative committee, upon any investigation, proceeding or trial, for or relating to or concerned with a violation of any section of this chapter relating to bribery or any section of this article or an attempt to commit any such violation, upon the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him may tend to convict him of a crime or to subject him to a penalty or forfeiture; but no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he may so testify or produce evidence, documentary or otherwise, and no testimony so given

or produced shall be received against him, upon any criminal investigation, proceeding or trial."

[To the same effect, see also *Penal Law* §§584 (Conspiracy) and 996 (Gambling).]

Code of Criminal Procedure, §619:

"**Disobedience to subpoena, or refusal to be sworn or to testify, how punished**

"Disobedience to a subpoena, or a refusal to be sworn or to testify, may be punished by the court or magistrate, as for a criminal contempt in the manner provided in the judiciary law."

Judiciary Law, §750:

"**Power of courts to punish for criminal contempts**

"A. A court of record has power to punish for a criminal contempt, a person guilty of any of the following acts, and not others: * * *

"5. Contumacious and unlawful refusal to be sworn as a witness; or after, being sworn, to answer any legal and proper interrogatory * * * ".

Judiciary Law, §751:

"**Punishment for criminal contempts**

"Punishment for a contempt, specified in section seven hundred and fifty, may be by fine, not exceeding two hundred and fifty dollars, or by imprisonment, not exceeding thirty days, in the jail of the county where the court is sitting, or both, in the discretion of the court. * * * "

Penal Law, §600:

"Criminal contempt

"A person who commits a contempt of court, of any one of the following kinds, is guilty of a misdemeanor: * * *

"6. Contumacious and unlawful refusal to be sworn as a witness, or, after being sworn, to answer any legal and proper interrogatory; * * *."

Statement of the Case

Petitioner was appointed a patrolman in the Police Department, City of New York, on November 21, 1942. In April, 1944 he was assigned to plainclothes duty in the office of the Police Commissioner, located at No. 240 Centre Street, County of New York. He continued such duty at that location until January, 1947, when he was transferred from plainclothes to patrol duty. On March 7, 1951, he resigned from the Police Department to enter private business.

Prior to this occasion, at no time during his employment in the Police Department had the petitioner been subpoenaed to appear before a grand jury or at the office of any district attorney in connection with any investigation touching on corruption in the enforcement of gambling laws.

More than five and one half years after termination of his last assignment in connection with the enforcement of gambling laws at No. 240 Centre Street in the County of New York, petitioner was subpoenaed to testify before the grand jury in Kings County.

Petitioner appeared pursuant to this subpoena before the grand jury, Kings County, on October 3, 1952. Without waiving immunity, he gave formal, immaterial testimony of an identifying nature. On a well-grounded and reasonable belief that a truthful answer would subject him to prosecution for criminal behavior under the laws of the State of New York, and—on the other hand—that an untruthful answer would subject him to prosecution for perjury, petitioner refused to answer a question concerning his possession of a safe deposit box on the explicit grounds that his answer would incriminate him and that his silence was constitutionally privileged.

Petitioner was then brought before the County Court, Leibowitz, J. presiding, for preliminary disposition. Without making any inquiry to determine whether or not a possible answer would incriminate the defendant, the presiding judge returned him to the grand jury room with instructions to answer the question. Petitioner refused to answer, claiming his constitutional privilege against self-incrimination, and the grand jury under Judge Leibowitz's direction returned this indictment.

There is no question that petitioner was "the target" of the grand jury investigation. The foreman flatly admitted that petitioner "was under investigation" (R. 72, f. 215). The questions propounded by the assistant district attorney were addressed to petitioner's possible culpability and his alone.

> "Do **you** have a safe deposit box?" (R. 8, f. 23).
>
> "I now ask **you**, Mr. Breslin, while **you** were in the Confidential Squad of the Police Commissioner's office as a plainclothesman did **you** have a safe deposit box?" (R. 8, f. 24).

The record is clear and emphatic that their purpose was to obtain incriminating evidence to convict the petitioner of some crime—extortion committed under color of official right, perjury, larceny, or whatever might develop from the petitioner's answers. The assistant district attorney frankly admitted at trial that such was the case.

> "[I]f he said he had a safe deposit box, if that was the truth, I would want to know what is in that box. The grand jury would want to know, 'Have you got cash in that box? Whose name is that box in? Are you hiding **anything?**'
>
> "On the other hand, if he answered, 'No, I haven't got a safe deposit box,' and he did have a safe deposit box, he would be committing perjury" (R. 111, f. 332).

The indictment explicitly charged petitioner with refusal to answer after "a judge [Leibowitz, J.] duly presiding in the County Court of Kings County, upon application therefor duly made, directed said defendant to answer the questions propounded to him in the Grand Jury and to testify" (R. 8, f. 24). The State Supreme Court then, for bias, disqualified this judge from sitting at trial of the indictment returned by a grand jury acting under his direction and charging petitioner with contempt of the same judge's order to testify (Appendix, *post, p. iii*). The State appellate court unanimously denied review to this order of disqualification (Appendix, *post*, p. iv).

Trial of the indictment thus tainted took place before a colleague of the disqualified judge and a "blue ribbon" or special jury. The substituted colleague denied all motions of petitioner, all of his reqests to charge, and virtually

directed a verdict of guilty. The language of the trial judge speaks for itself.

"So we have five elements which constitute the crime charged in this indictment, and ordinarily in a criminal case the elements or essentials of the crime charged are all questions of fact and must be determined and decided as such by a jury. But in this case, under the testimony here, **I hold as a question of law three of the five elements I announced to you, and hold that they were questions of law, not questions of fact.** If they were questions of fact, I would submit them to you jurors" (R. 133, f. 398).

* * * * *

"So on this essential, I charge you that in your deliberations you are not to concern yourselves with the question of whether or not the Grand Jury was a legal institution on October 3rd last (R. 134, f. 402).

* * * * *

"So I am deciding as a matter of law that the questions were legal and proper, and you are not to be concerned with this question in your deliberations. Do you understand that, jurors?

"The fourth element of the crime that I announced to you is: Were the questions relevant and germane to the investigation the Grand Jury was conducting? * * * " (R. 137, f. 409).

"So on this point, jurors, common sense would tell us that it is not necessary to be a graduate of Harvard Law School in order to decide whether the questions asked and which the defendant refused to answer were relevant and in conformity to the inquiry, and should have been answered by him.

"So let me instruct you that you are not to concern yourselves with this element in your delibera-

tions. And I further instruct you as a matter of law that the questions in issue were germane, were relevant, were pertinent to the matters under consideration, and that this defendant should have answered them, and, further, that he was duty bound to answer them" (R. 138-39, ff. 114-15).

Counsel for petitioner timely called the trial judge's attention to these charges with appropriate exceptions (R. 142-45, ff. 426-435).

ARGUMENT

POINT I

The prejudice of the presiding judge under whose direction the indictment against petitioner was returned coupled with the "directed verdict" of guilty by the trial judge denied the petitioner due process of law under the Fourteenth Amendment.

Although the presiding judge was disqualified to sit at trial, the indictment against petitioner charged a refusal to obey his direction to answer interrogatories and was returned by a grand jury acting under his direction in the County Court. The prejudice of the presiding judge with respect to cases such as the one involving petitioner could readily be documented by reference to editorial press comment, but counsel does not believe the press is the appropriate forum to pass upon judicial bias. In any event, the State court disqualified him. The prejudice of the presiding judge coupled with the virtual "directed verdict" of the trial judge denied the petitioner

his liberty without due process of law in violation of the Fourteenth Amendment. *Tumey* v. *Ohio*, 273 U. S. 510; *Thomas* v. *District of Columbia*, 90 F. 2d 424. See also *In Re Oliver*, 333 U. S. 257.

POINT II

The conviction violates the due process and privileges and immunities clauses of the Fourteenth Amendment of the Constitution of the United States.

The record in this case squarely presents the question of whether the grand jury may be subverted so as to become an instrumentality for the manufacture of technical, procedural crime. The district attorney has someone "under investigation", suspected of extortion, larceny, bribery or some other crime. His investigation has turned up some hearsay and rumors, clearly insufficient as grounds for arrest, much less indictment and conviction of the "suspect". Without admissions and self-inculpating evidence from the person under investigation, the first step toward his conviction cannot be taken. A grand jury subpoena is forthwith issued, and with it comes absolute assurance of conviction of the suspect of some crime. The "witness" has three alternate routes to follow, but each one leads unerringly inside the prison gate: [1] he may answer the prosecutor's questions and provide the necessary admissions and self-incriminating evidence to convict himself of some felony; [2] he may answer the prosecutor's questions and make denials of material self-incriminating facts, and thus convict himself of the felony of perjury; or [3] he may not answer at all and be con-

victed of criminal contempt. This *tertium quid* cannot be possible in a State having a constitutional guarantee of a privilege against self-incrimination.

Is this a case of certain conviction by the technique of the three alternatives? The assistant district attorney explicitly states that it is:

> "What is the easiest thing in the world to do? [1] If he said, 'Yes, I have a safe deposit box,' and it developed that there was graft in there, it might lead to the crime of bribery, which is a felony. [2] If he said, 'No, I haven't got a safe deposit box,' in answering that question, it would be perjury, which is also a felony. [3] The best thing to do is not to answer at all. Don't answer at all, * * *. Because what happens? The worst that happens is you are convicted of a misdemeanor. That is all a criminal contempt is. That is the least risk that man ran" (R. 111, f. 333).

As pointed out in the Yale Law Journal (Vol. 49, pp. 1075, 1076) with respect to immunity statutes, including that in New York:

> "The phraseology of the statutes is uniform. * * * There is a tendency to liberality of construction when the witness is claiming his privilege [citing *Matter of Seymour* v. *Larkin*, 254 App. Div. 215, 4 N. Y. S. 2d 428]; to stringency when he pleads his immunity in bar [citing *People* v. *Clemner*, 159 Misc. 860, 289 N. Y. Supp. 1069; *People* v. *Grossman*, 145 Misc. 781, 262 N. Y. Supp. 66]."

The decisions of the Court of Appeals in two similar cases argued and disposed of on the same day illustrates the Janus-faced appraisal of immunity on the face of a claim of privilege against self-incrimination. In *Regan* v.

People of the State of New York, No. , October Term, 1953, the Court of Appeals affirmed a conviction for criminal contempt for refusal to answer a concededly self-incriminating question, although the defendant admittedly had no immunity because the court implicitly held that he had made an effective waiver by signing a paper. In the other case, the instant one, the Court affirmed a conviction for the same crime before the same grand jury although there was never any claim of waiver of immunity. The Court observed *in dicta* that petitioner had immunity. According to previous cases in this State, had petitioner answered and incriminated himself, the Court might well have *held* that the immunity statute was no bar to conviction.

The evolution of the doctrine that the due process clause of the Fourteenth Amendment of the Constitution of the United States protects the individual's "liberty of silence" and "right of privacy" against State interferences such as that in the instant case is hardly a generation old. As late as 1922, the Supreme Court said in *Prudential Insurance Co.* v. *Cheek*, 259 U. S. 530 at page 543:

> "(N)either the Fourteenth Amendment nor any other provision of the Constitution of the United States imposes upon the States any restrictions about 'freedom of speech' or the 'liberty of silence'; nor, we may add, does it confer any right of privacy upon either persons or corporations."

It goes without saying that no statement has ever been more squarely repudiated by a court than this one in several score of cases before the Supreme Court in the past two decades, beginning with an assumption *arguendo* in *Gitlow* v. *New York*, 268 U. S. 652 in 1925, and with the

first square holding that freedom of speech is protected by the Fourteenth Amendment in *Near* v. *Minnesota*, 283 U. S. 697, in 1931. It would be unnecessary and repetitious to review all of these cases to determine the scope of freedom of speech, liberty of silence and right of privacy which the Supreme Court has held within the ambit of the Fourteenth Amendment. From some of the most recent decisions, it is clear that the Fourteenth Amendment protects individual liberty of silence and right of privacy against State governmental invasion such as the misuse of grand jury subpoena in the instant case.

In *Wolf* v. *Colorado*, 338 U. S. 25, the Supreme Court unanimously held that the individual's right to privacy was protected by the Fourteenth Amendment against unwarranted attempts by the State to obtain evidence in a criminal proceeding. Said the Court (338 U. S. at pages 27, 28, 29):

> "The security of one's **privacy** against arbitrary intrusion by the police—which is at the core of the Fourth Amendment—is basic to a free society. It is therefore implicit in the 'concept of ordered liberty' and as such enforceable against the States through the Due Process Clause. • • •
>
> "Accordingly, we have no hesitation in saying that were a State affirmatively to sanction such police incursion into **privacy** it would run counter to the guaranty of the Fourteenth Amendment. • • •
> "As a matter of inherent reason, one would suppose this to be an issue as to which men with complete devotion to the protection of the **right of privacy** might give different answers."

Notwithstanding the parallel holding in the *Wolf* case, *supra*, that the Federal Court exclusionary rule of evi-

dence did not apply to the fruits of a State invasion of privacy, the Supreme Court more recently held that a State conviction obtained under such circumstances must be reversed as violative of the due process clause in the Fourteenth Amendment. The Court said in *Rochin* v. *California*, 342 U. S. 165 at page 172:

> "Illegally breaking into the privacy of the petitioner, the struggle to open his mouth and remove what was there, the forcible extraction of his stomach's contents—this course of proceeding by agents of government to obtain evidence is bound to offend even hardened sensibilities. These are methods too close to the rack and the screw to permit of constitutional differentiation."

Concurring, Justice Black reiterated his "belief that state as well as federal courts and law enforcement officers must obey the Fifth Amendment's command that 'No person * * * shall be compelled in any criminal case to be a witness against himself.' I think a person is compelled to be a witness against himself not only when he is compelled to testify, but also when as here, incriminating evidence is forcibly taken from him by a contrivance of modern science." *Id.*, 342 U. S. at pages 174-5. And Justice Douglas said in concurrence, *Id.*, 342 U. S. at pages 178-9:

> "As an original matter it might be debatable whether the provision in the Fifth Amendment that no person 'shall be compelled in any criminal case to be a witness against himself' serves the ends of justice. Not all civilized legal procedures recognize it. But the choice was made by the Framers, a choice which sets a standard for legal trials in this country. The Framers made it a standard of due process for prosecutions by the Federal Govern-

ment. If it is a requirement of due process for a trial in the federal courthouse, it is impossible for me to say it is not a requirement of due process for a trial in the state courthouse."

Apart from recognition of the right of privacy as within the protection of due process, see also *United States* v. *Morton Salt Co.*, 338 U. S. 632, 652, it is abundantly clear that liberty of silence or freedom from punishment for refusal to testify is also guaranteed against State infringement by the due process clause of the Fourteenth Amendment. *Wieman* v. *Updegraff*, 344 U. S. 183; *Chambers* v. *Florida*, 309 U. S. 227; *Ashcraft* v. *Tennessee*, 322 U. S. 143; *Malinski* v. *New York*, 324 U. S. 401. There is indeed little qualitative difference between the actual execution by a State of its threat of a year's imprisonment unless the witness provides incriminating evidence against himself, on one hand, and threat of dismissal unless a test oath is taken (*Wieman*), or five days of questioning while incommunicado unless such incriminating evidence is provided (*Chambers*), or thirty-six hours of such interrogation (*Ashcraft*), or stripping the witness (*Malinski*), on the other hand, so far as the requirements of the Due Process Clause embrace "those canons of decency and fairness which express the notions of justice of English-speaking peoples even toward those charged with the most heinous offenses." *Malinski* v. *New York, supra*, 324 U. S. at page 416-17; *Rochin* v. *California, supra*, 342 U. S. at page 169.

There has been in the past considerable difference of opinion among members of the Supreme Court as to whether the privileges and immunities or due process

clauses in the Fourteenth Amendment "absorb" and make applicable to the States the prohibition against self-incrimination of the Fifth Amendment. Since the adoption of the Fourteenth Amendment, at least twenty-one justices of the Supreme Court have indicated their belief that the Fourteenth Amendment has such effect. *Cf. Adamson* v. *California*, 332 U. S. at pages 68-123. In two cases, *Adamson* v. *California*, 332 U. S. 46, and *Twining* v. *New Jersey*, 211 U. S. 78, the Court has held that the Amendment has had no such effect, both cases with long dissents and the former with four Justices dissenting. Neither case involved punishment by a State of an individual for his refusal to speak, such as the instant one, but merely the question of the admissibility of evidence in a State court which presumably would not have been admissible under the Fifth Amendment in a Federal court.

CONCLUSION

Wherefore, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

THOMAS J. MACKELL,
Attorney for Petitioner.